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VOLUME 35 • NUMBER 7 • MAY 1960

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PARKER & SON PUBLICATIONS, INC.
229 E. FOURTH STREET, LOS ANGELES 13
MADISON 6-9171

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OFFICIAL MONTHLY PUBLICATION OF THE LOS ANGELES COUNTY BAR ASSOCIATION. ENTERED AS SECOND CLASS MATTER OCTOBER 15, 1943, AT THE POSTOFFICE AT LOS ANGELES, CALIFORNIA, UNDER ACT OF MARCH 3, 1879. SUBSCRIPTION PRICE $2.60 A YEAR; 40C A COPY.

THE PRESIDENT'S PAGE

☆ ☆ ☆ ☆ ☆ ☆ ☆ ☆ GRANT B. COOPER

» » THERE ARE LESSONS for lawyers in the results of a poll of 600 laymen in Los Angeles and Orange Counties by Robert V. Wills, a Long Beach attorney who specializes in corporation law, but was curious about what kind of an image the profession imprints on the public mind. (The poll was reported on in the September, 1959, issue of The Bulletin.)

On the credit side of the ledger, as cast up by Mr. Wills's inquiry, was the fact that 80 per cent of those interviewed by letter felt that attorneys help maintain our free society and promote good government.

Other impressions were less flattering, and if they are as general as the survey by mail appears to indicate, would require considerable thought and effort on the part of the profession to ameliorate if not eradicate them.

Are we too wordy, as some of those polled thought? Are we more interested in winning the case than in seeing justice is done? Are we "too pompous and self-important"? Is a trial in court more a game of skill and guile than a search for truth? Are lawyers more concerned with their fees than their clients' welfare? And do we charge too much?

We know that some of these conclusions are highly unjust, yet must concede that in some instances certain of the impressions in the public's mind are based on what we might term good evidence.

Even if any of the entries on the sinister side of the ledger are valid, it means our honorable and honored profession has a duty to eliminate them as a first step in a tremendous job of public relations.

I think one of the wisest things our Board of Trustees has done for some time was adoption of the resolution seeking to discourage participation by association members in simulated court proceedings on television or radio.

Despite the sincere efforts by some of our brothers to persuade and induce the producers of such entertainment to seek to present a true, even if "thumb-nail," representation of how judicial proceedings are actually conducted, the end result has too often been woeful if not ridiculous.

The effect of many of these entertainments on the public mind may well be reflected in the erroneous and less-than-flattering impression of law and lawyers reflected in Mr. Wills's survey.

Lawyers need not and should not be on the defensive so far as the public opinion of our profession is concerned. We are members of an ancient and

honorable craft and perform personal and public services far beyond the degree of recompense which we average.

Is it not somewhat ironic that attorneys, who devote many years and considerable money to acquiring proficiency in the arts of communication, not to mention prowess in persuasion, are so little understood and appreciated by the layman?

"With all this training and background in effective communication (and normally a fine linguistic IQ and a proclivity toward articulation behind him), one would certainly expect the attorney to have won a fine place for himself in the court of public opinion," our pollster colleague comments.

That this has not been accomplished could well be laid at the door of our failure to tell the public in constructive ways of our indispensable service to the ordinary citizen, to our failure to convince the layman of our vital role in the fostering of the ideals and rules of a free society, and to our neglect of some of the fundamental procedures and precautions that ordinary public relations would dictate.

I am sure there are very few lawyers who have not smarted at one time or another when they heard a layman refer to some member of the profession as a "shyster," "ambulance chaser" or in other uncomplimentary terminology. Undoubtedly our suffering colleague was fully aware of the injustice of the appellation, but may have been in doubt as to how to counteract it.

Our Association has a very fine public relations committee which is ready, willing and able to assist members in preparing material for speeches, pamphlets, films and other means of "putting our best foot forward" so far as the layman is concerned.

If more members of the Bar could persuade themselves to participate in a general effort to "show the flag" by telling our story to the public at every opportunity, it is safe to say that within a relatively short time there would be effected a significant change—for the better, so far as we are concerned—in the findings of some such earnest researcher as our Long Beach colleague.

In this connection it would do no harm to remind our fellow citizens that lawyers have played and today play vital roles in all three branches of government, that all but 10 of our 34 Presidents have been lawyers, and that but for the intelligence, patriotism and self-sacrifices of lawyers in the formative years of our Republic, the United States probably would not be as strong, as just, nor as prosperous and respected as it is today.

FRONT COVER

Los Angeles Building of the State Bar, at 1230 West Third Street, which was dedicated April 4. See story page 225.

Congress and the Supreme Court's Appellate Jurisdiction

By WILLIAM A. NORRIS and JULIAN BURKE

» » THE PROVISION of the Constitution which subjects the appellate jurisdiction of the Supreme Court to regulation by Congress has been the constitutional launching pad for a rash of bills orbiting around the congressional hopper in recent sessions. Almost without exception, each of these bills has directly or indirectly sought to reduce the existing appellate jurisdiction of the Court by expressly denying it the power to review various types of cases. In general, the bills reflect the displeasure of some congressmen with specific Supreme Court decisions in two sensitive areas: segregation and national security. While much has been said about the wisdom of such proposals from a policy standpoint,[1] little or no comment has appeared on the question of their constitutional validity. Yet the constitutional question which would inhere in legislation limiting the Supreme Court's appellate jurisdiction seems worthy of comment.

There is no doubt but that Congress has broad regulatory power over the Supreme Court's appellate jurisdiction. In Section 2 of Article III of the Constitution it is provided that, in all cases to which the judicial power of the United States extends (other than cases within the Court's original jurisdiction), the Supreme Court

> "shall have appellate jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make."

The Constitution thus makes an affirmative grant of appellate jurisdiction to the Court, but then grants to Congress the power to restrict that jurisdiction.[2] The problem is to ascertain the bounds of Congress's Constitution-conferred power to restrict the Court's Constitution-conferred appellate jurisdiction. Is that congressional power broad enough to permit Congress to deny the Court appellate jurisdiction over any case or class of cases which one or another dissident congressman might suggest? Or is the power, as with other legislative powers, limited by some standard of reasonableness so as to render laws unconstitutional which arbitrarily restrict the Court's appellate jurisdiction?

The McCardle Case

It might appear that the power of Congress to make exceptions to the Court's appellate jurisdiction is a plenary power to withhold or withdraw such jurisdiction, perhaps even

[1] See, e.g., Sheldon, Court-Curbing Proposals in Congress, 33 Notre Dame Lawyer 597 (1958).

[2] While the appellate jurisdiction of the Court flows directly from the Constitution, an affirmative bestowal of such jurisdiction by Congress implies a denial of all other under the congressional power to make exceptions. *Durousseau v. United States*, 6 Cranch 307 (1810). See also *Wiscart v. Dauchy*, 3 Dall. 321 (1796).

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to the point of abolishing it. *Ex parte McCardle*, 7 Wall. 506 (1869), is the famous example of the dramatic lengths to which Congress may go in the exercise of that power. As will be recalled, that case involved a Mississippi newspaper editor who was held in custody by military authority for trial before a military commission in connection with certain allegedly incendiary and libelous articles which he had published in the post-Civil War South. The military authorities were acting under the Reconstruction Acts. The publisher, McCardle, filed a petition for a writ of *habeas corpus* in the Circuit Court for Southern Mississippi alleging that the Reconstruction Acts were unconstitutional. The writ was issued, but after a hearing McCardle was remanded to military custody. He thereupon took an appeal to the Supreme Court. After the case had been argued but before decision thereon, Congress, over President Johnson's veto, passed an act which withdrew appellate jurisdiction from the Court in certain *habeas corpus* proceedings, including McCardle's. The act was motivated by a fear on the part of the Reconstructionists in Congress that the Court was about to declare the Reconstruction Acts invalid.[3] The Court thereupon dismissed the appeal for lack of jurisdiction. In its opinion, the Court noted that it was "not at liberty to inquire into the motives of the legislature," but could "only examine into its power under the Constitution." Without analysis, the Court simply observed that Congress has the express power to make exceptions to the Court's appellate jurisdiction, with the result that the repealing act in question was valid and left the Court without jurisdiction to proceed.

While *McCardle* and cases following it[4] have gone far indeed in sustaining congressional power over the Supreme Court's appellate jurisdiction, and while no expression by the Court to date even suggests any limitations on that power, it need not be concluded that no such limitations exist. The holdings of the decided cases are not inconsistent with the existence of some limitations on Congress's power. Not even *McCardle*—where an act was sustained which President Johnson, in his veto message, described as one "which may be construed into . . . an attempt to prevent or evade [the Court's] decisions on a question which affects the liberty of the citizens"[5]—requires the conclusion that congres-

[3]See 3 Warren, The Supreme Court in United States History 187-210 (1922 ed.).

[4]See e.g., *Railroad Co. v. Grant*, 98 U.S. 398, 491 (1878); *Kurtz v. Moffitt*, 115 U.S. 487, 497 (1885); *Cross v. Burke*, 146 U.S. 82, 86 (1892); *Missouri v. Missouri Pacific R. Co.*, 292 U.S. 13, 15 (1934); *Stephan v. United States*, 319 U.S. 423, 426 (1943).

[5]3 Warren, The Supreme Court in United States History 199 (1922 ed.).

sional power in this area is entirely limitless.

Suggested Limits to Congress's Power

A note in Hart and Wechsler in the form of a dialectic (a very effective and interesting study technique) suggests an argument to the effect that Congress may not constitutionally completely abolish the Supreme Court's appellate jurisdiction:

> "A. You read the *McCardle* case for all it might be worth rather than the least it has to be worth, don't you?
>
> "Q. No, I read it in terms of the language of the Constitution and the antecedent theory that the Court articulated in explaning its decision. This seems to me to lead inevitably to the same result, whatever jurisdiction is denied the Court.
>
> "A. You would treat the Constitution, then, as authorizing exceptions which engulf the rule, even to the point of eliminating the appellate jurisdiction altogether. How preposterous!
>
> "Q. If you think an 'exception' implies some residuum of jurisdiction, Congress could meet that test by excluding everything but patent cases. This is so absurd, and it is so impossible to lay down any measure of a necessary reservation, that it seems to me the language of the Constitution must be taken as vesting plenary control in Congress.
>
> "A. It's not impossible for me to lay down a measure. The measure is simply that the exceptions must not be such as will destroy the essential role of the Supreme Court in the constitutional plan. McCardle, you will remember, meets that test. The circuit courts of the United States were still open in *habeas corpus*. And the Supreme Court itself could still entertain petitions for the writ which were filed with it in the first instance [despite the repealing act approved in McCardle]."[6] Hart and Wechsler, The Federal Courts and the Federal System, 312 (1953).

Professor Crosskey has also expressed the view that the power of Congress to make exceptions from the Supreme Court's constitutionally conferred appellate jurisdiction is not an absolute power.[7] He argues that there are two limitations on this so-called excepting power. First, he says, no part of the Court's constitutionally conferred appellate jurisdiction can be taken away unless the jurisdiction taken away is given to other Article III courts. This limitation primarily, if not exclusively, has to do with the fact that state courts can and do hear "cases" to which, under Article III, the judicial power of the United States extends. In its application, Crosskey's limitation would mean that Congress could "except" from appellate review by the Supreme Court such cases coming up from state courts, but could do so only if some other Article III federal court were given jurisdiction to review the state court decisions.

Professor Crosskey's second limitation on congressional "excepting" power relates to the fact that the Constitution expressly differentiates between the Supreme Court as a court which is "supreme" and the other federal courts which are "inferior." He argues that the power of Congress to make exceptions to the Court's appellate jurisdiction "may not be used to destroy, or impair," the Court's *supremacy* within any field in which it is conferred by the Constitution. Thus, Mr. Crosskey continues,

> ". . . while it is plainly *not* required that the Supreme Court

[6] See *Ex parte Yerger*, 8 Wall. 85 (1869).
[7] 1 Crosskey, Politics and the Constitution 617 (1953).

be permitted to hear every 'case' within the enumerated categories, it *is* required that, under any substituted scheme of 'appellate jurisdiction' more selective as to 'cases' than that which the Constitution provides, the way shall nevertheless be kept open for getting before the Court *all* the different kinds of *questions* which the enumerated 'cases' comprehend. For *only so* can be Court's 'suprem[acy],' *as conferred upon it by the Constitution*, be preserved to it unimpaired." 1 Crosskey, Politics and the Constitution, 617 (1953). (Mr. Crosskey's emphasis.)

There are, of course, difficulties with each of the above suggestions of limitations on the congressional regulatory power over Supreme Court appellate jurisdiction. The idea expressed in the Hart and Wechsler dialectic that Congress cannot completely abolish the Court's appellate jurisdiction – perhaps a purely academic proposition even if correct– ignores the rationale of such cases as *Wiscart v. Dauchy*, 3 Dall. 321 (1796), a predecessor of *Durousseau v. United States*, 6 Cranch 307 (1810), to the effect that the Supreme Court cannot exercise appellate jurisdiction unless and until an act of Congress has bestowed it.[8] And Professor Crosskey's suggestions, as he admits, merely amplify the views expressed by Justice Story in *Martin v. Hunter's Lessee*, 1 Wheat. 304 (1816), in connection with his famous but soon and often rejected[9] dictum that it was mandatory upon Congress to create inferior federal courts fully vested with all the jurisdiction they were constitutionally capable of receiving. Nonetheless, despite their difficulties and shortcomings, these suggested limitations on Congress's "excepting" power may become important should Congress ever attempt any drastic curtailment of the Court's appellate jurisdiction.

Aside from the arguments suggested by Hart and Wechsler and by Crosskey, two other arguments come to mind which look toward some limitation on the power of Congress in this area. First, it can hardly be doubted that Congress cannot use its "excepting" power to promulgate a substantive rule of constitutional law contrary to a rule established by the Court, thereby "amending" the Constitution. For example, consider a congressional enactment which excepted from the Supreme Court's general appellate jurisdiction all cases in which the appellant relied upon *Brown v. Board of Education* in the court below. This would be an obvious attempt by Congress to nullify the constitutional doctrine of the School Segregation Cases. The "excepting" power of Congress under Article III is at least limited by the foremost provision of that same article —the judicial power of the United States is vested in the courts, not in Congress. Cf. *United States v. Klein*, 13 Wall. 128 (1872). And certainly the Constitution cannot be amended by any legislative enactment.

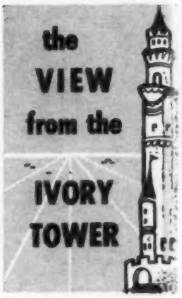
That is precisely the type of thing involved in a bill introduced by Sen-

(Continued on page 229)

[8]Mr. Justice Frankfurter, dissenting in *National Mutual Ins. Co. v. Tidewater Transfer Co.*, 337 U.S. 582, 655 (1949), has said: ". . . Congress need not give this Court any appellate power; it may withdraw appellate jurisdiction once conferred. . . ." Mr. Justice Roberts also stated that he saw nothing "to prevent Congress taking away, bit by bit, all the appellate jurisdiction of the Supreme Court. . . ." Hearings on S.J. Res. 44, 83rd Cong., 2nd Sess., Jan. 29, 1954.

[9]See, e.g., *Turner v. Bank of North America*, 4 Dall. 8, 9 (1799); *Cary v. Curtis*, 3 How. 236 (1845); *Sheldon v. Gill*, 8 How. 441 (1850); *Kline v. Burke Construction Co.*, 260 U.S. 226, 233-34 (1922).

ARBITRATION
and the dilemma of possible error



By EDGAR A. JONES, JR.

I.

» » THERE ARE TIMES when a law professor or a practicing attorney throws up his hands in exasperation at an unexpected and seemingly irrational turn of decision in an area of the law then concerning him. On those occasions I have more than once heard it opined (in the back of my own head, admittedly, as well as off the tongues of others) what a pity it is that we cannot simply unstick the maze of judicial precedent, leaving intact only those enlightened decisions which add wisdom to our jurisprudence.

It takes neither personal acquaintance nor peculiar insight to know that that unsticking spirit of juridical laissez-faire often has a beckoning quality for judges discomfited by the unwisdom of their brethren, contemporaries as well as predecessors. Of course, appellate review and the doctrine of stare decisis considerably inhibit a trial judge's capacity to respond to it. Consider in contrast, however, the relatively uninhibited state of the arbitrator.[1] Most people realize simply from reading their newspapers that there is a mechanism for reaching impartial decisions in labor and trade disputes called arbitration. What is not so generally realized, even within the legal profession, is that California arbitrators have decision making powers not possessed even by judges.

Section 1288 of the California Code of Civil Procedure provides for the vacation of an arbitrator's award only where "corruption, fraud or undue means" taints the procurement or issuance of the award, or where the arbitrators are guilty of "misconduct" prejudicial to the rights of any party, or where the arbitrators have exceeded their powers or imperfectly executed them.

It is clear enough that a good deal of arbitral discretion could be cut down by preemptive judicial review under the theory of an arbitrator exceeding his "powers." In New York judicial misuse of that notion has been regarded as improperly ousting arbitrators of their power to decide matters at issue between the parties on the merits.[2] But in California, the thrust of appellate decision is in the opposite direction. Thus it is here that the "Arbitrators are not bound to a strict adherence to legal procedures. They are not required to find fact, give reasons for their awards, or de-

[1]See Jones, *Labor Arbitration and Stare Decisis*, 4 UCLA L. REV. 657 (1957).

[2]See Summers, *Judicial Settlement of Internal Union Disputes*, 7 BUFFALO L. REV. 405 (1958).

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scribe the processes by which they arrived at their decisions."[3] Further, "Arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action."[4] Finally, "in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute."[5]

In the *Crofoot* case, for instance, the court dismissed the appellant's contention of an error of law apparent on the face of the arbitral award, stating "Even if the arbitrator decided this point incorrectly, he did decide it. The issue was admitted properly before him. Right or wrong, the parties have contracted that a decision should be conclusive. At most, it is an error of law, not reviewable by the courts."[6] Cap this sweeping allowance with the corollary that arbitrators need pay no heed to the decisions of other arbitrators either in the same or other plants. In practice, arbitral decisions in like cases are regarded (if regarded at all) as no more than potentially persuasive, dependent solely upon whatever force of reason is generated in the opinion of the other arbitrator. There is even debate among arbitrators, mindful of the individual nature of the cases, whether an arbitrator should properly deem himself bound by viewpoints previously expressed by him in other cases involving other employers and even in earlier cases involving the same employer.

II.

Set against the strictures on the exercise of the discretion of judges, the arbitrator's lot should be a happy one indeed. Even so, it seems to me that the conscientious arbitrator is left with a rather substantial problem created by this very power which leaves him free to decide each case on its own merits.

As an arbitrator in a number of labor dispute cases I must admit that the finality of this power has always somewhat awed me. I do not say that with any sense of withdrawal from responsibility. Like all decision makers I have ever met, I am quite confident that I can analyze facts, deduce issues from them, evaluate arguments, maintain my mind in a state of impartial detachment, and reach decisions reflecting the inherent merits of cases brought before me. But observation of my peers in and out of the legal profession must certainly convince me that I can also commit error, even egregious error, in the exercise of any one of those decisional skills. Thus with assurance I can state two conclusions concerning my decisions as a labor arbitrator. First, in close to one hundred arbitration cases I know of not a single one in which I have issued

[3]Drake v. Stein, 116 Cal.App.2d 779, 785 (1953).
[4]Sapp v. Barenfeld, 34 Cal.2d 515, 523 (1949).
[5]Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 186 (1953).
[6]Id. at 189.

an erroneous decision. I say this despite my awareness that in all those cases I am sure that at least half the parties might be willing to observe that they have knowledge to the contrary, and despite my own sense that it would be miraculous in the extreme were one person to make one hundred decisions without committing error. This leads me to my second conclusion, which might best be stated in the form of a question. If I did commit error, how could I know? My decisions were never upset upon ultimate review on the merits with respect either of the normative rules which I formulated or invoked, or of the facts which I found.

Without in the least indulging in self-derogation, I can say that I strongly suspect that this record of apparent imperviousness to error (a record, I should add, shared by all arbitrators whom I know) is simply due to lack of informed review on the merits by someone competent to do so after the issuance of my award.

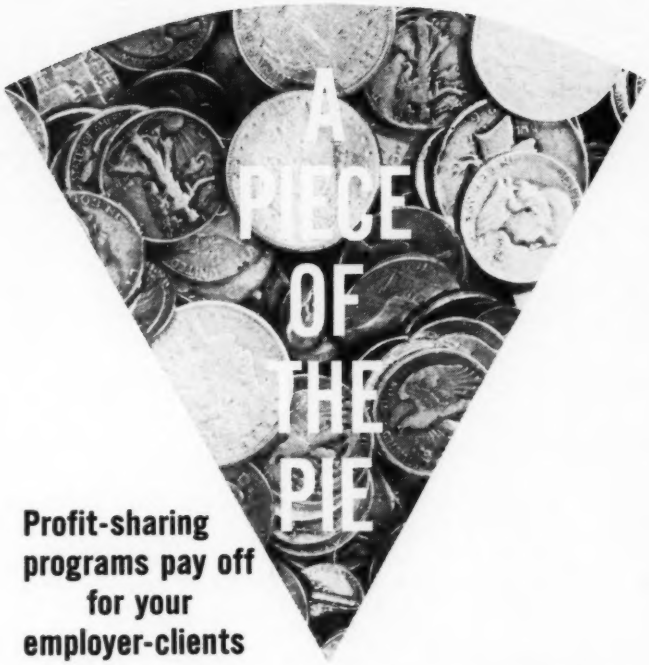
Once again, I hasten to observe that I am not in any manner suggesting the propriety of preemptive judicial review of arbitral awards on the merits. In my judgment, the proclivity of the New York courts to oust the judgment of arbitrators in the guise of an examination of an alleged exceeding of their powers is regrettable. By hypothesis, the parties have indicated their mutual desire to resolve their disputes by the grievance procedure, culminating in arbitration, which they have negotiated and included in their collective agreement. A decision has been rendered pursuant to that agreement. Part of the free enterprise commitment of our society is reflected in the fact that the great majority of responsible people on both sides of the labor-management "fence" are committed to voluntarism in the handling of their disputes. That is also the legislative policy embodied in our labor laws. At this point to remove the dispute to the courts for what is really a consideration on the merits quite obviously inhibits that voluntarism in the settlement of labor disputes. The parties also seek expertise in that decision making process. Yet judicial preemptive review at the behest of a disaffected losing party substitutes the judgment of a person who does not purport to be a specialist in the handling of this particular type of dispute for one who had been jointly selected by the parties for that specific reason.

It seems to me quite compatible with disapproval of judicial preemption nonetheless to observe the need for an informed review of an arbitral award before its final issuance by an arbitrator. Of course, I have purposely placed in that last sentence the phrase "informed review." It is precisely because judicial preemptive review is not "informed" that it is to be deprecated as frustrating the achievement of the worthy policy goals implicit in the arbitral process. But who may then be said to be "informed" other than the arbitrator himself? That question may readily be answered, I suppose, by asking another. Who is more "informed" as to possible error than a losing party as determined by the arbitral award?

III.

Given a proper rejection of judicial preemptive review as a solution to the dilemma of possible error in the arbitral award, and assuming decisional fallibility to be part of the human situation from which no decision maker can secede, is there any effective

(Continued on page 232)



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tax reminder

Travel and Entertainment Expense

Expense Accounts and Employer's Records

By DAVID E. AGNEW
Of the Los Angeles Firm of Kindel & Anderson

» » THE COMMISSIONER of Internal Revenue has been concerned with the possible abuses of expense accounts of employees, and on the other hand with the burden apt to be imposed upon multitudinous taxpayers if record-keeping requirements were made too stringent.

In Technical Information Release No. 221, issued April 4, 1960, and in Revenue Ruling 60-120, the Commissioner has set forth the rules governing the keeping of records of this type of expense, which seem fairly designed to bring to light abuses without requiring a snow of paper work.

It has been provided since the adoption of Regulation 1.162-17 in 1958 that an employee who accounted to his employer for reimbursed travel and entertainment expense would not be required to account in detail for such expenses on his own income tax return, unless he claimed expenses in excess of the reimbursement received (Reg. 1.162-17(b)).

It is now made clear by Rev. Rul. 60-120, if it was not so before by the Regulation and T.I.R. 198 (issued Dec. 29, 1959), that the account to the employer must actually be a rather detailed accounting of amounts spent, times when spent, and the reasonableness and business necessity of the expenditure.

The account rendered by the employee will be protective only if the employer has adequate accounting procedures for the reporting and substantiation of expenses. An important factor in determining the adequacy of the procedures is the existence of audit controls over expense accounts.

In addition, T.I.R. 221 sets forth information and questions that will be required to be furnished or answered on the 1960 income tax returns for corporations, partnerships, and sole proprietorships, the essence of which is that the amounts paid as expense account allowances to the more highly paid employees or partners will be required to be set forth; and those businesses which indulge in the luxury of hunting lodges, yachts, furnishing of apartment suites, paid vacations, and like fringe benefits for employees, will be required to affirmatively show that fact.

Expense account allowances include not only direct payments as advances or reimbursement but also amounts paid by the employer for expenses incurred by the employer, specifically including those charged through any type of credit card.

The employers' procedures for handling expense accounts should be reviewed in the light of these requirements. They appear to proceed upon the assumption that if the employer, after reasonably careful review of all expense allowances to an employee, is satisfied to accept the expense as a reasonable and necessary one, the Internal Revenue Service will do likewise. If there are inadequate procedures the Internal Revenue Service seems justified in regarding the expense account as suspect, which is precisely what T.I.R. 221 indicates it will do.

PLEASE TAKE NOTICE

Copies of the **Directory of Tax Offices in Los Angeles** are available for distribution at the office of the Los Angeles County Bar Association. This helpful index of names and telephone numbers of Federal, State and local tax officials was prepared by, and the supply of copies donated by, the Los Angeles Chapter of the California Society of Certified Public Accountants. • • • The Junior Bar Conference of the American Bar Association has announced the establishment of a "clearing house" of information on current **job vacancies for young attorneys** in Federal agencies. Inquiries should be directed to the JBC at the American Bar Center in Chicago. • • • The semi-annual **Cumulative Bulletins** of the Internal Revenue Service issued from 1927 to date are in limited supply but are available on a "first come, first served" basis for those who wish to complete their sets or start new ones, according to the Superintendent of Documents. Prices vary from 75¢ to $3.75, depending on the issue.

notes from your Law Library

by JOHN W. HECKEL • Head Reference Librarian, Los Angeles County Law Library

CONGRESSIONAL INVESTIGATIONS: *Contempt of Congress* by Carl Beck (Hauser Press, 263 p.) reviews the background of the contempt process and its use by the Committee on Un-American Activities from 1945-1957. There is a list of persons indicted and the disposition of their cases.

CONVEYANCING: *The Improvement of Conveyancing by Legislation,* by Lewis M. Simes is a treatise with Model Acts prepared at the University of Michigan School of Law for the ABA Section of Real Property. Half of the book is devoted to a consideration of remedies to general and specific conveyancing problems. The other half is devoted to model acts and a discussion of their constitutionality, marketable title legislation, statutes of limitations, and hazards in conveyancing practice.

CRIME: *The Mind of the Murderer,* by Manfred S. Guttmacher (Farrar, 256 p.), who is medical adviser to the trial courts of Baltimore, presents the Issac Ray lectures reviewing some of the practical problems he encounters. The first part discusses particular types of murderers. The second part deals with aspects of going into court and giving expert testimony, while the last chapter presents the dilemma of the psychiatrist who must tell the truth in court to promote justice, but who must keep silent because of confidential communication. Another book, *A Study of Murder* by Stuart Palmer (Crowell, 239 p.) is a combination of a case history and a statistical study of murderers and nonmurderers. For each of the 51 murderers there was a control group of 51 nearest-in-age brothers of each to discover what frustrations of childhood have to do with motivating homicide.

CRIMINAL LAW: *Ehrlich's Criminal Law,* by the noted San Francisco attorney, J. W. Ehrlich (Matthew Bender, 716 p.) is an encyclopaedic approach to criminal law and procedure in California. It is arranged topically, with complete quotes from codes sections followed by summaries of case holdings with citations. It is simple, direct and brief.

DAMAGES: Belli's *Modern Trials,* v. 5 (Bobbs Merrill) is a tabulation of awards involving parts of the body, the body as a whole, mind injuries, pain and suffering, disease and traumatic injuries.

HUMOR: *The Legal Architect,* edited by Wilmore Brown (Michie, 247 p.) is a collection of summary quotes from the reports, mainly from Penn-

sylvania, Ohio and other eastern jurisdictions. It is divided into four parts: animal adjudications; life, love and the Pursuit of Liberty; legal architects, which presents the author's idea of landmarks in the construction of the law, and a final collection of humorous quotations from four selected judges.

PATENTS: *An Outline of United States Patent Law* by Richard E. Brink and others (Interscience Publishers, 280 p.) presents an outline of United States Code, Title 35; The Rules of Practice and the Manual of Patent Examining Procedure.

SUPREME COURT: *Quantitative Analysis of Judicial Behavior* by G. A. Schubert (Michigan State University Press, 392 p.) subjects the opinions of the Supreme Court to statistical analysis to discover correlations and to predict how a justice will decide a particular case.

TAXATION: *Legal Instruments and Federal Taxation: Procedure, Transactions, Forms* (Boardman, 2136 p.) is a one volume work designed for the general practitioner who should know something of the effect of taxation on all phases of his practice. Purchases, real estate, corporations and partnerships, life insurance, and matrimonial problems are some of the subjects covered. *Federal Income Taxation* by R. S. Holzman (Ronald Press) is another one volume treatment of tax principles and planning.

TREASON: *Trial for Treason* by George Keeton (Macdonald, 256 p.) is an account of four trials set against the background of the history of the times. The Earl of Essex, a favorite of Queen Elizabeth I, was tried for fomenting rebellion against her in 1601. Alice Lisle, an old woman who was victim of the Bloody Assize, took part in Monmouth's rebellion. Lord Lovat, last man beheaded by the axe, was a follower of Bonnie Prince Charlie. The trial of Sir Roger Casement in 1916, still a subject of controversy, is also recounted.

WILLS: Page on *Wills* (Anderson Co.) is being revised for the first time since 1941 by Professors Bowe and Parker of the University of Colorado School of Law. The main changes deal with the impact of estate planning and taxation on the drafting of wills. Coverage of statutes has been increased, as well as the cases of the last 20 years. The whole set will comprise 8 volumes compared with the original 5 volumes. There is a comparative table showing where sections in the 3d ed. are treated in the new revised edition.

GOVERNMENT PUBLICATIONS: A new annotated edition of the *Charter of Los Angeles County* compiled by Harold Kennedy, County Counsel, has been published (76 p.). *The Code of the City of Pomona* (Michie, 792 p.) has been published for the first time.

Depositing the time capsule and affixing the State Bar seal on the new Los Angeles office building of the State Bar. From l. to r. Burnham Enersen, State Bar President, Mayor Norris Poulson, Joseph Ball, Past President of State Bar.

New State Bar Building

» » SINCE APRIL 4, 1960, the Los Angeles building of the State Bar has been a reality. Its handsome and spacious facilities have already proven to be of great convenience to the regular staff as well as to the lawyers in this area serving on State Bar Committees. Located on West Third Street, between Boyleston and Bixel, it stands just west of the Harbor Freeway.

Participating in the dedication ceremonies in the nearby Chamber of Commerce Building were many notables of the bench and bar, including the members of the California Supreme Court. Burnham Enersen, State Bar president, presented Joseph Ball, past president, who gave the dedicatory address. James Boyle was introduced as the Chairman of the Building Committee responsible for the construction.

The new building is occupied by a staff of thirteen, of which three are lawyers. It contains three conference rooms for the use of the Board of Governors, the Committee of Bar Examiners and the various special committees of the State Bar. However, there are no facilities for bar association meetings as such inasmuch as the structure was designed to accommodate only the official functions of the State Bar.

Information on the Continuing Education of the Bar Program, legal ethics, special committee activities, and bar examinations is available on inquiry. The address is 1230 West Third Street, Los Angeles 17, MAdison 9-1121.

Bar Assn. Adopts Policy Concerning Radio, Television

» » ON APRIL 21, 1960, the Board of Trustees of the Los Angeles County Bar Association made public its resolution of February 3, 1960, concerning the appearance of lawyers on television and radio shows depicting court trials. The Board emphasized that its opinion is advisory only but announced that it had asked the Board of Governors of the State Bar to formulate a Rule of Professional Conduct on the subject. If such were enacted then its violation would constitute ground for disciplinary action. A copy was also sent to the Committee on Professional Ethics of the American Bar Association which never has officially passed upon the issues involved but Chairman James L. Shepherd, Jr., of that committee said that the matter

would be discussed within the next few weeks.

The Board made clear that the resolution was not intended to be a mass condemnation of those lawyers presently participating in such shows, because there has been no clear stand taken by the Association previously. However, it will now serve as a guide to future conduct.

The text of the resolution follows:

RESOLUTION
of
Board of Trustees
Los Angeles County Bar Association

ADOPTED FEBRUARY 3, 1960

WHEREAS, from time to time the Board of Trustees of the Los Angeles County Bar Association has considered the professional and ethical implications of the appearance of lawyers on radio and television programs in the role of lawyers or judges in productions of a simulated or re-created judicial proceeding; and

WHEREAS, the Board, being of the view that a reconsideration of the subject was desirable in the light of actual experience with the operation and presentation of a considerable number of such programs; to which end it appointed a special committee to study this problem; and

WHEREAS, this committee has made such a study and has filed its report in which it is pointed out that programs of this type, as they have been generally presented, tend to create erroneous views and impressions of the true nature of judicial proceedings, of the function of the lawyer and the judge therein, and of the correctness and fairness of the law; that these programs are frequently undignified in content and treatment; that it is impractical to provide any workable method, even if that were desirable, of preventing such improper or misleading presentations; and that, as a consequence of the nature of these programs and the method and manner of their presentation, they tend to bring the administration of justice and the courts into disrespect; and

WHEREAS, it is the opinion of the committee expressed in its report that the participation of lawyers in such programs is professionally and ethically improper because it involves them in conduct violative of their oath to maintain the respect due courts of justice and judicial officers, and because such participation is contrary to the long-standing policy of the Bar against self-advertisement direct or indirect; and

WHEREAS, the report of this committee has been approved by the Board; NOW, THEREFORE,

IT IS RESOLVED that in the opinion of the Board of Trustees of the Los Angeles County Bar Association it is professionally and ethically improper for a lawyer to appear in the portrayal of the role of a lawyer, judge, or court officer or attache in any radio, television or motion picture production which depicts in any way an apparent or seeming re-enactment, re-creation or simulation of the trial or conduct of causes in the courts or other tribunals before which lawyers appear, whether such lawyer's name or his status as a lawyer is or is not announced, advertised or otherwise revealed on, in connection with, or outside of, such production, and whether such portrayal is or is not an occasional or a repeated one.

IT IS FURTHER RESOLVED that any prior opinion of this Board inconsistent with the foregoing is hereby to that extent rescinded and withdrawn.

LAW DAY PROCLAIMED — *A proclamation setting May 1 as Law Day in Los Angeles County and urging citizens to be mindful of the many civic contributions made by the legal profession was approved by the County Board of Supervisors. Shown presenting the proclamation to Grant Cooper (center), president of the L.A. County Bar Association, are Supervisor Frank G. Bonelli (left) chairman of the Board of Supervisors, and Supervisor Warren M. Dorn, who introduced the resolution.*

Bar Celebrates Law Day

» » UNDER THE CHAIRMANSHIP of Milford Springer, the Law Day celebrations sponsored or encouraged by the Los Angeles County Bar Association and its affiliates reached a new level of effectiveness and enthusiasm.

Starting with a proclamation of the County Board of Supervisors on April 26 and continuing to May 2, innumerable pronouncements, editorials and events brought the message of the rule of law to the citizens of this county. There were proclamations by mayors of a number of cities, materials were made available to all public schools, to churches and to civic organizations, and the bar associations' speakers addressed schools, service clubs, women's clubs and other groups.

On the suggestion of the L. A. Bar committee a special ceremony admitting 125 new citizens took place in the court of Chief U. S. District Court Judge Pierson M. Hall on April 29 in which the Law Day theme was stressed. On May 1 Justice Mildred L. Lillie, Loyd Wright, past president of the American Bar Association, and A. Stevens Halsted, Jr., Senior vice-president of the L. A. Bar, addressed the National Association of Women Lawyers at the Ambassador Hotel on the theme of World Peace Through Law. Then on May 2 in Department 12 of the Superior Court the occasion was marked by talks by Judges Harold P. Huls, Parks Stilwell, and Louis R. Burke, and by Supervisor Kenneth Hahn and Committee Chairman Springer, in a special observance.

One of the most unique publicity techniques was achieved by the L. A. Bar Association when it obtained the cooperation of the Post Office Department in adopting a special postmark "Law Day U. S. A. May 1." By it the message was carried on 11,000,000 pieces of mail.

Glendale Bar Assn.

The outstanding event of the June meeting of the *Glendale Bar Association* will be an address by the Hon. Marshall F. McComb, Associate Justice of the California Supreme Court. Reservations for the dinner (New York cut steak, at $6.00 per person) may be made through Tom Jeffers, 3806 Ocean View Blvd., Montrose, CHurchill 9-3969, before June 10. The meeting, to be preceded by a cocktail hour, is scheduled for 7:30 P.M., June 16, 1960, at the Verdugo Club, 220 West Broadway, Glendale.

Persons Who Served on the Federal Courts Criminal Indigent Defense Panel During 1960

January and February

Gizella Allen
Michael Berg
E. O. Berry
Gene Babbin
Edwin C. Boehler
Elton D. Boone
William J. Brown
Antonio G. Bueno
Paul Caruso
Gilda R. Cohen
Sam Cooper
Carl D. Dresselhaus
Richard C. DuPar
Selma K. Ellner
Jack D. Fine
John A. Fleming
Vera V. Fogg
Theodore R. Gabrielson
Leonard Golove
R. Noel Hatch
D. Clifford Higgins
V. Lane Knight
Sherman A. Kulick
Frederick S. Lacey
Morris Lavine
Allan L. Leonard
Gerald A. Malat
Brian G. Manion
Edward Marouk
Jun Mori
Joseph F. Noriega
J. George Ohanneson
Harold Rostow
Alvin F. Slaight, Jr.
Robert R. Stevens
Isabel Trotti
Barbara Warner
Stanley Weinstein
Gerald B. Yam

March

Bernard G. Babbin
J. William Brown
Antonio C. Bueno
Gilda R. Cohen
Leonard Colene
Sam Cooper
Carl D. Dresselhaus
Merrill R. Francis
Edward I. Gritz
Luther L. Jensen
Richard M. Moore
Jun Mori
J. George Ohanneson
Robert Priver
Alvin F. Slaight, Jr.
William W. Vaughn
Barbara Warner

April

Robert E. Ames
Richards D. Barger
Albert D. Barouh
Arthur S. Bell, Jr.
Robert S. Brazelton
John E. Caldwell
Andrew Castellano
Noel Conway
John R. Crowe, III
Karl L. Davis, Jr.
George M. Dell
Albert H. Ebright
R. Noel Hatch
William P. Hogoboom
Ronald L. Jacobson
Earl Klein
James H. Knecht, Jr.
Richard D. Lower
David Maddux
James A. McLaughlin, Jr.
John J. Quinn, Jr.
Herbert N. Samuels
Leroy B. Taft, Jr.

ator Johnston of South Carolina in 1958. This bill (S. 3467, 85th Cong., 2d Sess.) sought to take away the Supreme Court's appellate jurisdiction in any case where there is drawn in question the validity of state action relating to public schools "for any reason other than substantial inequality of physical facilities and other tangible factors." Patently, this is an attempt to revive as constitutional doctrine in school segregation cases the "separate but equal" rule. Might not such a law be an unconstitutional usurpation of judicial power by Congress since, realistically, it would indirectly involve legislating constitutional doctrine?

Griffin v. Illinois, 351 U.S. 12 (1956), suggests the other, and perhaps most important, possible limitation on Congress's regulatory power over the Court's appellate jurisdiction. In that case, the Court held that the due process and equal protection clauses of the Fourteenth Amendment were violated by a state's denial of appellate review of a criminal conviction where the denial was based solely upon the inability of the defendant to pay for a trial transcript. It was reasoned that, while "a State is not required by the Federal Constitution to provide appellate courts or a right to appellate review at all," if appellate review is granted by the State it must be available on a non-discriminatory basis. As Mr. Justice Black put it, "at all stages of the proceedings the Due Process and Equal Protection Clauses protect persons like petitioners from invidious discrimination." 351 U.S. at 18.

Similarly, it would seem that while Congress has wide discretionary control over the appellate jurisdiction of the Supreme Court, and while all appellate review may be "a matter of legislative grace,"[10] Congress does not have a license to discriminate in doling out Supreme Court review by making "differentiations . . . that have no relation to a national policy of . . . appeal." 351 U.S. at 21-22 (Mr. Justice Frankfurter concurring). It is true, of course, that the *Griffin* case was decided under the due process and equal protection clauses of the Fourteenth Amendment. But it is now clear that the due process clause of the Fifth Amendment is to some extent, at least, interchangeable with the due process and equal protection clauses of the Fourteenth. *Bolling v. Sharpe*, 347 U.S. 497 (1954). With the ever increasing importance of substantive due process in constitutional law, it must be recognized as a real possibility that due process could come into play in litigation testing the validity of an exercise of Congress's Article III "excepting" power. Cf. *Battaglia v. General Motors Corp.*, 169 F.2d 254, 257 (2nd Cir.), *cert. denied* 355 U.S. 887 (1948).

In this connection, it may be interesting to look for a moment at the most famous recent bill introduced in Congress on the subject of limiting the Supreme Court's appellate jurisdiction. The Jenner Bill, first introduced in 1957 (S. 2646, 85th Cong., 1st Sess.) and reintroduced last year by a New York congresswoman (H.R. 634, 86th Cong. 1st Sess.), would deny the Court appellate jurisdiction in cases where there is drawn into the question the validity of certain specific governmen-

[10]The Francis Wright Case, 105 U.S. 381 (1882).

tal action. Each section of the bill is a transparent reaction to a particular Supreme Court decision. If this bill were enacted into law, the Court would lose jurisdiction to review any case involving the validity of:

(1) The activities or jurisdiction of congressional committees;[11]

(2) The federal employee security program;[12]

(3) Any state law relating to subversive activities;[13]

(4) Regulation by schools of subversive activities in the teaching body;[14]

(5) State regulation of admission to the practice of law.[15]

While Senator Jenner was apparently confident that his bill was constitutionally sound[16] it is at least arguable that the bill would carve out exceptions to the Supreme Court's appellate jurisdiction in a pattern having no rational relation to a national policy of appellate review. To the extent that that argument is sound, it should follow that Senator Jenner's bill (or parts of it) would be unconstitutional as a violation of substantative due process of law.

Policy Considerations

Of course, even if one were to conclude that Congress's "excepting" power were wholly limitless, all is not lost. History instructs that it is a difficult task at best to get a bill through Congress which is directed at limiting the Supreme Court's appellate jurisdiction. Furthermore, while individual members of Congress are offering such proposals,[17] others occasionally make proposals looking toward protecting the Court's appellate jurisdiction. For example, a constitutional amendment has recently been offered which would deny Congress any power to regulate the Court's appellate jurisdiction in cases arising under the Constitution. (S.J. Res. 57, 86th Cong., 1st Sess. (1959)). This proposed amendment would implement

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[11]A reaction against *Watkins v. United States*, 354 U.S. 178 (1957), in which the Court reversed the contempt conviction of a labor official who refused to tell a subcommittee of the House Unamercian Activities Committee the names of former associates who had engaged in Communist activities.

[12]A reaction against *Cole v. Young*, 351 U.S. 536 (1956), in which the Court, in holding that a Federal employee could not be discharged from a nonsensitive job for national security reasons, invalidated as inconsistent with the controlling act of Congress an executive order which had extended the security program to all government employment.

[13]A reaction against *Pennsylvania v. Nelson*, 350 U.S. 497 (1956), in which the Court held that a Communist Party member could not be prosecuted under a state sedition law for the reason that by the Smith Act of 1940 Congress had occupied the field of sedition to the exclusion of state laws.

[14]A reaction against *Slochower v. Board of Higher Education of the City of New York*, 350 U.S. 551 (1956), in which the Court held that an invocation of the Fifth Amendment privilege against self-incrimination before a Congressional Subcommittee on Internal Security could not be the basis for discharge of a Brooklyn college professor.

[15]A reaction against *Schware v. Board of Examiners of New Mexico*, 353 U.S. 232 (1957) in which the Court held that it was a denial of due process to refuse to admit to the Bar an otherwise qualified candidate who admitted that he had been a member of the Communist Party in the 1930's; and against *Konigsberg v. California*, 353 U.S. 252 (1957), in which the Court held that due process had been denied to a candidate for admission to the Bar who had refused to answer questions pertaining to Communist affiliations and beliefs.

[16]Hearings Before the Subcommittee to Investigate the Administration of the Internal Security Act and other Internal Security Laws of the Senate Committee on the Judiciary, 85th Cong., 1st Sess. 22 (1957).

[17]For example, Congressman Smith of Mississippi has introduced a bill (H.R. 659, 86th Cong., 1st Sess. (1959)) which, in the words of its preamble, is designed "to reestablish and reaffirm the basic constitutional doctrine of separation of powers." The bill, apparently an angry reaction to the School Segregation Cases, provides:

> "The established law of the United States shall be revised or changed only by legislative enactment," and
>
> "The courts of the United States and the courts of the several states of the United States shall not be bound by any decision of the Supreme Court of the United States which conflicts with the legal principle of adhering to prior decisions and which is clearly based upon considerations other than legal."

A more direct approach is offered by Mr. Sikes of Florida who would freeze *stare decisis* into the Constitution. He has proposed a constitutional amendment which would deny the Supreme Court power "to overrule, modify or change" any prior decision construing the Constitution or Acts of Congress. (H.J. Res. 201, 86th Cong., 1st Sess. (1959)).

a resolution adopted by the House of Delegates of the American Bar Association in 1950. By a vote of 92-35, the House of Delegates resolved:

> "That the American Bar Association approves the submission to the Congress of the United States of an Amendment to Article III, Section 2, of the Constitution of the United States of America, establishing in the Supreme Court of the United States appellate jurisdiction in all cases arising under the Constitution of the United States, both as to law and fact." 36 A.B.A. Journ. 948, 957 (1950).

The wisdom of the American Bar Association resolution becomes more apparent in light of the barrage of bills that would restrict the Supreme Court's appellate jurisdiction in various and devious ways. The dangers lurking in these bills are evident. We need only be reminded of the warning of the eminent Supreme Court historian, Charles Warren, voiced over 25 years ago:

> "Changes . . . restricting the appellate jurisdiction of the Court . . . would result in leaving final decision of vastly important National questions in the State or inferior Federal Courts, and would effect a disastrous lack of uniformity in the construction of the Constitution, so that fundamental rights might vary in different parts of the country." 1 Warren, The Supreme Court in United States History 27-28 (1923 ed.).

means for the assurance of the avoidance of error?

As might be expected, there are several possibilities. Which shall be utilized in a particular case must depend upon the circumstances of the parties to the particular case. Sometimes the choice will be made by the parties. Sometimes it will be made by the arbitrator according to his view of their desires and necessities. Let us now consider the choices available, proceeding from the least formal to the most formal.

A number of parties to labor arbitrations want nothing whatsoever to do with any "second-look" procedure. A clean cutting decision, one way or the other, which clears the deck of the particular problem, is the ideal arbitral decision for them. They are willing to live with the 50-50 odds for a favorable decision, assuming a careful selection of the arbitrator. They will simply write off any hurtful error until the next negotiation session and remedy it, if they feel the necessity, at the bargaining table. If the arbitrator's decision is seriously interruptive of their relationship, they can always tear it up and settle the matter themselves. I have heard of cases where that has been done.

Other parties seek to handle the problem of the avoidance of error by utilizing a tripartite arbitration panel, flanking the impartial arbitrator with an employer representative and a union representative who will convene with him after the hearing has been concluded but before he issues his final award. Sometimes the procedure is adopted of having the impartial arbitrator submit a final draft

of his award and opinion to the two partial members of the panel. This of course results in the effort of the ostensible losing party to snatch victory from the jaws of defeat and typically results in an emotional scene which can be disturbing to the future relationship of the parties.

In some cases, the parties or the impartial arbitrator adopt the solution of having him issue what is upon its face a final award, but one which is dated ahead several days. Within that period of time it is understood that the parties have the opportunity to contact the arbitrator should the losing party (or, for that matter, the prevailing party, or both) feel that serious error has been committed which the arbitrator would wish to avoid. If persuaded, the arbitrator simply announces that his award shall not issue on the date as appears upon it, and withdraws it from the parties requesting them to return it to him, issuing a later award and opinion reflecting the criticism. The difficulty with this procedure lies in the fact that the courts have taken the position that the arbitrator has no further jurisdiction once he has "issued" a final award.[7] Here the problem is to distinguish whether a tentative award or a final award has been issued. That problem involves judicial determination and so frustrates the idea of avoiding judicial intervention. A further objection to this procedure is that it tends to encourage the kind of objectionable *ex parte* atmosphere which exists when a losing party outside the presence of the other party seeks to prevail by telephone or letter upon an arbitrator to revise a tentative award. It thus unfortunately tends to cast doubt upon the existence of the due process fair hearing which is so vital to the continued acceptability of arbitration as a fair, quick, efficient and voluntary means of resolving disputes.

Finally, in those cases where it may have utility, there is available the device of a rehearing provision incorporated in an award, conditioning the finality of the award upon the expiration of the time within which to request rehearing. What are the arguments for and against that kind of post-award rehearing? First, of course, the issue of the legal power of the arbitrator to confer the right of a post-award rehearing must be examined. In that respect, his legal power is one thing when the parties encompass in their submission agreement a conditional direction to him to grant a post-award rehearing. It is another when he unilaterally embodies a post-award rehearing provision in his award. Second, assuming that he has the legal power, is it compatible with the goals of arbitration for the parties to authorize a conditional post-award rehearing (if he draws his power from that source) or for him unilaterally to create a conditional right to petition for a post-award rehearing? It must be observed preliminarily that there is very little legal authority in this area precisely because of the great discretion vested in the arbitrator by statute and judicial decision.

So that we may have something concrete in front of us while we analyze the issues radiating from arguments for and against a post-award rehearing, perhaps it would be wise to reproduce at this point a provision which I have drafted and have on occasion incorporated in actual awards:

Provision for Rehearing

For the purpose of entertaining a written request from either of

[7]Jannis v. Ellis, 149 Cal.App.2d 751 (1957).

the Parties for a rehearing to correct any material error of omission or commission, ambiguity, or question of application allegedly evident in the Opinion or Award, the Arbitrator shall, for a period of seven (7) days next following from the date of this Award, retain jurisdiction of the Matter submitted to arbitration by the Parties hereto, the retention of jurisdiction thus provided being necessary to effectuate the terms of the submission agreement of the Parties. Until the expiration of the relevant period of time stated in this provision for rehearing, this Award shall not be deemed to have been issued. If no request is duly filed, this Award shall be deemed to be issued effective this date. A written request for rehearing shall detail the specific grounds relied upon for alleging a material question, error, or ambiguity, and a copy thereof shall be mailed by certified mail to the other party or parties. If the written request is postmarked no later than the seventh (7th) day next following the date of this Award, it shall extend the jurisdiction of the Arbitrator for a period of seven (7) days next following the date of the written request. Within those seven (7) days the Arbitrator, having reexamined the Matter, shall in writing either reject the request for a rehearing or set a date for the requested rehearing. If the request for rehearing be denied, this Award shall thereupon be deemed to be issued effective that date and the jurisdiction of the arbitrator shall accordingly cease. If the request for rehearing be granted, the jurisdiction of the Arbitrator shall continue until issuance of a final amended Award incorporating or rejecting the substance of the allegations contained in the request, but in no event beyond five (5) days from the date that the rehearing is concluded, or that the final rehearing briefs of the Parties are postmarked, whichever shall be the later date, unless the Parties by mutual agreement extend that time limit.

It will immediately be noted that the granting of a rehearing pursuant to that provision is conditioned upon a detailed written statement of specific grounds indicating the necessity for correction of a material error of omission or commission or for the elimination of an ambiguity by the answering of a question regarding the application of the award.

Does an arbitrator have the legal power unilaterally to incorporate that rehearing provision in an award? The answer is yes, so long as the period within which the matter must be consummated by direction of the parties has not run by the time that either the right to petition has expired or a decision has been issued after the granted rehearing has been held.[8] Recognizing in passing that there are problems which may arise if the time provided in the rehearing procedures exceeds the original time grant of the parties,[9] let us for present purposes focus upon the issue of allowability within that time. What is the effect of this conditional award? Admittedly, an arbitrator is bound by the terms of the submission agreement executed by the parties whereby they commit the matter to him for decision.[10] So long as he stays within their agreed time limit, however, an award containing this rehearing provision is simply no final award until the time has expired within which the rehearing request

[8]See Silliman v. Carr, 159 Cal. 135 (1911); Dudley v. Thomas, 23 Cal. 365 (1863).
[9]See Jannis v. Ellis, 149 Cal.App.2d 751 (1957).
[10]O'Malley v. Petroleum Maintenance Co., 48 Cal. 2d 107, 110 (1957).

must be filed or the rehearing decision must have been issued. There is therefore neither a relinquishment nor an extension of jurisdiction by the arbitrator merely by the issuance of an award conditioned upon a right of rehearing. It simply is not yet an "award" in legal contemplation. Jurisdiction ceases, by the terms of the submission agreement, only when a final "award" is issued.[11] All that the arbitrator has done by this unilateral inclusion of a rehearing provision is indicate to the parties the terms of a proposed award which will be deemed by him to be issued as a final "award" only upon the expiration of certain stated periods of time. If those periods are within the time dictate contained in the submission agreement, the arbitrator's action in granting a rehearing is akin to nothing more than a "reopening" of the case prior to his issuance of a final "award." While the law appears to bar his unilateral reopening after issuance of a final "award,"[12] the California Supreme Court has recently declared that an arbitrator has the discretionary power to reopen a case to take further evidence at any time prior to his issuance of a final "award."[13] Further, it needs no argument to conclude that the arbitrator himself may determine the date of the effectiveness of his award, so long as the parties have not incorporated a contrary provision in their submission agreement.

Irrespective of whether an arbitrator may unilaterally condition the finality of the issuance of his award upon the happening of one of the

[11]Citizens Bldg. v. Western Union Co., 120 F.2d 982 (5th Cir. 1941); Rust Engineering Co. v. Lehigh Structural Steel Co., 79 F.2d 830 (C.A.D.C. 1935); Willis Finance Co. v. Porter, 88 Cal.App. 523 (1928).

[12]Willis Finance Co. v. Porter, 88 Cal.App. 523 (1928).

[13]Grundwald-Marx Inc. v. Clothing Workers, 52 Cal.2d 568 (1959).

events stated in the draft rehearing provision, any possible doubts are eliminated if the parties to the arbitration explicitly direct him in writing to include the provision in his award. He has no jurisdiction except as the parties confer it upon him. If at their suggestion or his[14] the terms of the submission agreement define his jurisdiction to include that spelled out in the draft provision, there is no possibility of a later challenge that he lacked jurisdiction to conduct a rehearing and issue a consequent award.

It may be concluded, therefore, that the legal power exists. What of the desirability of providing this variation of a second look to the losing party?

Potentially, the process may involve added expense in the form of the arbitrator's fees, attorney fees, or the costs of a transcription. It must be assumed, however, that the arbitrator selected by the parties is honest and is not going to use the rehearing as an immoral device to extract further per diem payments from the parties. Were it otherwise, the parties would from the outset have delivered themselves into the hands of a venal arbitrator, and this would certainly be a lesser hazard of that venality. Careful selection of the arbitrator, rather than avoidance of a rehearing provision, seems the answer to the risk of venality. But the cost argument is basically specious because it overlooks the factor of importance of sound decision to the parties. If the case were of little or no consequence to both parties, it should not be before the arbitrator in any event. If it is important enough to them to bring to arbitration, it is important enough to each of them to be assured of the chance to correct demonstrable error.

Of course, if there is no way to obtain correction of error by the arbitrator, the parties are remitted to judicial review. But, as we have already seen, the circumstances under which vacation of the award may be obtained are quite limited. Thus this corrective action is more illusory than real. We may conclude, then, that the rehearing provision does not merely delay a meaningful resort to corrective judicial review by the losing party since the odds are quite heavily against upsetting the award for error of law or fact.

It should be observed as a *caveat*, however, that a losing party might endanger its judicial vacation right under Section 1288 if it did not first perfect and have denied a request for rehearing pursuant to a rehearing provision incorporated in an arbitrator's award.[15] Failure to pursue the rehearing might very well act as a waiver of vacation, particularly if the provision was included in the award to accord with a direction by the parties contained in a submission agreement. This factor would tend to incorporate in the process automatic protective resort to a request for rehearing.

It would be unrealistic not to recognize that there is a substantial aversion among a significant number of persons to thinking of arbitration in terms of "justice" or of "law" rather than of utility to the collective bargaining process. But it would be unfortunate were that aversion to obscure the appropriateness of this rehearing procedure for advancing the goal of cooperation of employer and union in their continuing relationship. If an arbitrator has erred significantly,

[14]When a rehearing provision appears to be appropriate I use a mimeographed form agreement whereby the parties direct me to include the specific rehearing provision in my award.

[15]See Comment, *Exhaustion of Remedies Under Collective Bargaining Agreements: A Reappraisal*, 54 Northwestern University Law Review 646 (1960).

it is to the interest of both parties to get the error corrected so as to avoid unfortunate reactions to it. The losing party may be reluctant to resort to judicial review because the cure might have worse effects than the headache. But there appear to be no like grounds for concern about resorting to the rehearing procedure of their arbitrator. As to possible unhealthy prolongation of the dispute, after all, the cases would presumably be infrequent in which the procedure would be invoked by the losing party, and the granting by the arbitrator rarer still. The opportunity would seem to remove a possible irritant without substituting a new and different one in its place.

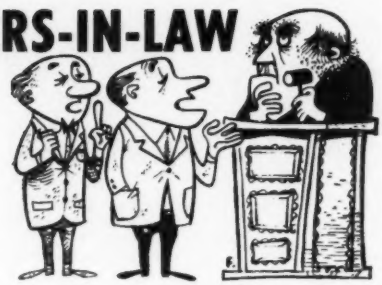
Of course, an arbitrator utilizing this provision should properly be quite chary of granting a rehearing. He should scrutinize quite carefully the allegations contained in a request for rehearing. He should be at pains to avoid allowing a situation to come into being where the losing party merely vents spleen in a rehashing of the case. The provision has been created as one means to assure the opportunity for review and correction in that unusual case where a losing party can demonstrate the existence of a material error which, were it called to the attention of the arbitrator, would cause him in fairness and justice to wish to correct it. It protects the parties against an unwittingly unjust or improper award, and the arbitrator against the commission of error. Perhaps, where it is appropriate to use it, it affords that measure of review which will protect the arbitral process from the eventual introduction of preemptive judicial review in response to a felt need for some kind of procedure for the avoidance of arbitral error. That, at least, is its design. Invoked by the parties with discretion, and administered judiciously by the arbitrator, inclusion of a rehearing provision in the arbitral award may add significantly to the utility of arbitration to disputants.

IV.

Arbitration is evolving as an increasingly elaborate and widely utilized adjudicative mechanism. Pennsylvania makes compulsory use of it now in disposing of lower valued personal injury cases, thereby markedly relieving court congestion. It is increasingly appearing in commercial contracts to avoid time consuming and costly resort to litigation. It is the mainspring of the grievance procedure of the vast majority of collective bargaining agreements in America, thereby drastically reducing the economic loss and personal hurt of labor dispute union strikes and employer lockouts.

For the student of law, this modern dispute resolution procedure has a fascinating parallel in the development centuries ago in England of the equitable powers of the Lord Chancellor in reaction against the unwieldy, time consuming and overly technical common law. But there is a caution implicit in that parallel. The burgeoning power of individual decision thus acquired by the Chancellors ultimately was checked. Procedures of review ultimately were imposed upon their individual discretion. The lesson of that parallel indicates that those who rightly encourage arbitration should also be attentive to assuring a reasonable degree of nonjudicial review to allow avoidance of error. Otherwise, judicial preemptive review may yet be imposed upon the arbitral process in the search for fairness even as it was upon the courts of equity.

BROTHERS-IN-LAW



By
GEORGE
HARNAGEL, JR.

Verbum Sapientibus

» » THIS DEPARTMENT normally eschews ladling out gratuitous advice. It is constrained, however, to make an exception with respect to the next luncheon meeting of the Association, on May 26. And our reason can be stated in two words: Irving Walker. Referred to frequently as the dean of the Los Angeles Bar, a distinction he would probably prefer to share with some of his contemporaries, he is for our time and money the unrivaled dean of our luncheon speakers.

Mr. Walker is scheduled to reminisce at our May meeting and has chosen "It Happened Some Years Ago" as the title for his remarks as he believes that "will not be too confining." The perspicacious may detect a *double-entendre* here (which may or may not have been intended), for *it happened some years ago*—three or four, we believe—that he was also scheduled to reminisce at one of our luncheons. On that occasion, because of too many preliminaries, his time was drastically curtailed. Nevertheless he packed far more fascinating lawing and living into 15 minutes than most of our speakers are able to do in double the time.

Our advice? It should be well telegraphed by now: *Don't miss this.*

Men of Old

Associate Editor Buell Doelle of *Michigan Bar Journal,* who has been rummaging through some old proceedings of the Michigan Bar Association (forerunner of the State Bar of Michigan), reports that the appetites of modern lawyers cannot hold with those of their more stalwart predecessors. To prove his point he sets out the menus served at some of the Association's banquets of fifty years ago or more. We have room (in this column, we mean) for only one. This was the gastronomical line-up in 1904 and is typical:

> Puree of tomato soup, salted almonds, celery, olives, mixed pickles, ham, cold tongue, finger rolls, Boston brown bread, tenderloin of beef with mushrooms, creamed new potatoes, green peas, Roman punch, lettuce and tomato salad, with mayonnaise, salted wafers, Metropolitan ice cream, angel food cake and macaroons, coffee, cigars, and Chateau Margaux.

Probably cost them a buck and a half, too.

° ° °

Something to Worry About

"The use of nuclear merchant ships in international commerce will present many legal problems. . . . Who would establish the regulations? Who should

be able to inspect the ships? Should it be the country where the ship was built, where the reactor was built, whose flag it flies, or of each port? What would be done in the case of a Japanese tanker with a British reactor running on atomic fuel obtained from Canada, flying a Liberian flag, domiciled in France, operated by a Panamanian subsidiary of a Dutch company, entering the port of New York?" —Jerome S. Rubin of the **New York** Bar in an address on "Admiralty Law in the Atomic Age" as reported in *Harvard Law Record.*

* * *

In 1958, the latest year for which nation-wide statistics are available, 3,819 applicants took the bar examination in New York, 1,778 in California, and 1,006 in Illinois. The percentages of those passing was 49%, 52% and 70%, respectively. No other state had as many as 1,000 applicants. At the other end of the scale Vermont had only 14 applicants, but it did relatively well by them, passing 11, or 79%. Things were really tough up in Montana where there were 19 applicants and only 5, or 26% passed. That was the lowest percentage in any state. In North Dakota and West Virginia 100% of the applicants made the grade.

* * *

E Pluribus Unum

Last summer we heard reverberations of a complicated realignment of lawyers that occurred in San Francisco, but we did not see until a short time ago the formal announcement of its birth issued by the brand new law firm that emerged from the operation. The announcement came to our attention in a rather round-about manner.

The Brief Case of the San Francisco Bar Association recently ran an article on Ben K. Lerer, the newly elected treasurer of the association and now the bottom man on the escalator which leads predictably to its presidency. Mr. Lerer is one of the partners of the firm mentioned. The article noted that the announcement of the firm's advent had been reproduced in *The New Yorker,* which had added the comment: *"Whole thing took place during one of those high fogs."*

If it was good enough for *The New Yorker,* maybe it's good enough for us, too. In any event, we reproduce it below as it was reproduced in *The Brief Case's* reproduction of *The New Yorker's* reproduction of the original work of art:

LOUIS O. KELSO AND
SAMUEL L. HOLMES,
WHO ARE WITHDRAWING AS PARTNERS OF
BROBECK, PHLEGER & HARRISON

ROBERT H. SCHNACKE,
WHO IS RESIGNING AS UNITED STATES
ATTORNEY FOR THE NORTHERN DISTRICT
OF CALIFORNIA

BEN K. LERER AND
AYLETT B. COTTON,
WHO ARE MERGING THEIR LAW PRACTICES
INTO THE FIRM
TAKE PLEASURE IN ANNOUNCING
THE FORMATION OF A PARTNERSHIP FOR
THE GENERAL PRACTICE
OF LAW, PARTICULARLY CORPORATE,
TAX, FINANCIAL, LABOR,
ESTATE AND TRIAL MATTERS,
UNDER THE FIRM
NAME OF

KELSO, SCHNACKE, LERER, COTTON
AND HOLMES
ASSOCIATED WITH THE FIRM WILL BE
EDWARD L. MULLINER,
GEORGE C. KEELER AND
VINCENT W. JONES
WHO ARE RESIGNING
AS ASSOCIATES OF BROBECK, PHLEGER &
HARRISON, AND

JOHN V. W. ZAUGG,
WHO IS RESIGNING AS ASSISTANT TRUST
OFFICER, BANK OF CALIFORNIA

260 CALIFORNIA STREET

* * *

No Payola?

If you have never dipped into the "Book Reviews" section of *Journal of Legal Education,* the scholarly trade paper of the American law school professor, you don't know how highly the damn-it-with-faint-praise technique of literary criticism has been developed. Take for example the following excerpt from the recent review by Professor Ronan E. Degnan of the College of Law, University of Utah (and late of Boalt Hall, Berkeley) of "Cases and Other Materials on the Law of Sales Transactions" by Professor William E. McCurdy of the Harvard Law School:

> "Casting to one side the temptation to say that I disagree with the editor's evident conception of what the law of sales is all about, or what the law should be, I must say that this is not a bad book. Teaching it I would use far fewer cases . . . I would use a theme other than the one he provides to thread them on, and I would greatly regret the cost of classroom time needed to impart information about commercial practice that I think a courseb should contain [but which this one doesn't]. One chapter, 'Sales Distinguished from Certain Other Transactions' . . . seems at best useless and at worst dangerous nonsense. . . ."[1]

It's a pity this wasn't written about a casebook on Bills and Notes, for then we could sum up the review as a (well) qualified endorsement.

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